United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

Original 77-7145

To be argued by
ROSEMARY CARROLL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

THE GUARDIANS ASSOCIATION OF THE NEW YORK CITY POLICE DEPARTMENT, INC., THE HISPANIC SOCIETY OF THE NEW YORK CITY POLICE DEPARTMENT, INC., OSWALDO PEREZ, and FELIX E. SANTOS, individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, DEPARTMENT OF PERSONNEL OF THE CITY OF NEW YORK, THE NEW YORK CITY POLICE DEPARTMENT, ALPHONSE D'AMBROSE, individually and in his capacity as Chairman of the Civil Service Commission of the City of New York and Personnel Director of the City of New York, JAMES SMITH and JOSEPHINE GAMBINO, individually and in their capacity as members of the Civil Service Commission of the City of New York, and MICHAEL J. CODD, individually and in his capacity as Commissioner of the New York City Police Department,

Defendants-Appellants.

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF

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REPLY BRIEF

(1)

Appellees contend that the principal explanation for the alleged underrepresentation* of minorities in the New York City Police Department is that discriminatory competitive examinations for police officer resulted in later appointment dates

*Respondents compare a 10% minority membership in the Department with a 40% New York City minority population.

and lesser seniority for minorities. (Appellees Brief p. 3).

This contention is without merit because: (a) appellees offered no proof that appointment dates for minorities resulted solely, or even primarily, from scores on examinations. In fact, the only proof submitted here shows that non-discriminatory pre-employment processing, i.e. satisfactory completion of prerequisites for appointment, determined appointment dates. (Exhibit 00, 1). (ii) The comparison between the minority population of New York City and the minority population of the New York City Police Department is inappropriate since the entire minority population is not qualified to become police officers and recruitment for the Department is not limited to New York City residents. Moreover, the appellants proved that minorities constitute only 18.7% of the relevant labor pool. (iii) The critical factor is that the post-Act minority hire rate for the New York City Police Department is 23%.

(II)

Appellees argue that Franks v. Bowman, 424 U.S. 747 (1976), does not require a post Title VII discriminatory hiring practice to overcome the 703(h) exception for bona fide seniority systems.

The legislative history, however, reflects the Congressional intent to make Title VII prospective in application and to preserve bona fide seniority

systems in existence at the time of its passage. Franks holds that where "an illegal discriminatory practice occurring after the effective date of the act is proved", the §703(h) exception does not insulate otherwise neutral seniority systems from retroactive adjustments predating the passage of the Act. 424 U.S. at 762.

Thus, this case presents, as found by the Court below, the operation, of a concededly neutral seniority system, no past discrimination and no intentional pre-act discrimination. Since 703(h) is inapplicable where there is post-Act discrimination, it must be applicable where only pre-Act discrimination is alleged otherwise there is no case in which 703(h) exception applies.

Respondents argument really is that present effects of past practices, no matter how remote those practices, give rise to Title VII jurisdiction. Such a interpretation vitiates the purpose of 703(h) as well as of 42 USC §20003-5(3). There is moreover, no way to reconcile that argument with Franks and the holding of this Circuit in Monell v. Department of Social Services of the City of New York, 532 F 2d 259 (2d Cir. 1976), Cet. gr. 45 U.S.L.W. 3508, Docket No. 75-1914, January 25, 1977. In Monell, contrary to appellees' suggestion there were effects of pre-Act disciminatory practices. The Court, nevertheless, held that a post-Act violation

of Title VII is required to establish jurisdiction. As appellees observe in Monell there was no claim that pre-1972 discriminatory acts were perpetuated by further discriminatory acts after Title VII. (Appellees Brief p. 32). Similarly, there are no discriminatory acts after Title VII here. The lay-offs were made pursuant to state law on a color-blind basis and are not discriminatory acts. See also Popkin v. New York State Health and Mental Hygiene Facilities Improvement Corporation, 547 F 2d 18 (2nd Cir., 1976).

In support of their analysis plaintiffs rely heavily upon Acha v. Beame, 531 F 2d 648 (2d Cir. 1976) and U.S. v. Bethlehem Steel, 446 F 2d 652 (2d Cir., 1971). Contary to appellees' suggestion, the appellants' reading of Franks was not rejected by this Court's denial of an application for rehearing in Acha.

Rather, as Judge Gurfein observed at the argument on the application for a stay of the District Court Order here, the issue of the application of Franks was left open in Acha. The District Court, too, noted that this issue was not resolved in Acha although it erroneously held that such a conclusion should be implied.

U.S. v. Bethlehem, supra, preceded Franks and specifically involved admitted and continuous

discriminatory practices with respect to departmental seniority after the effective date of the Act. This Court stated:

> "The facts as to discrimination were admitted by defendants in two extensive stipulations. These showed that both before and after the passage of the Civil Rights Act of 1964 blacks were treated unfairly at the Lackawanna plant in hiring, job assignment, apprenticeship and selection of supervisors. The following patterns of discrimination continued up to the time when the Government began its inquiry into Bethlehem's practices." 446 F 2d 655

If further stated:

> "Although these overt practices were finally discontinued after October 1, 1967 - over two years after the effective date of Title VII and in response to governmental investigation - the seniority and transfer provisions perpetuated their effects...." 446 F. 2d 658

Because there is no post-Act discriminatory practice here, U.S. v. Bethlehem is of no relevance. The cases cited by appellees highlight the appellants' position. In each case cited there was proof of post-Act discriminatory practices, either in the form of discriminatory hiring or discriminatory seniority systems or even pre-Act intentional discrimination.

(III)

The appellees have great difficulty in deciding which act constitutes the Title VII dis-

seniority system, which, as the District Court, held "no one attacks as discriminatory in any way" (Opin. p. 12). In Point I A(4), plaintiffs allege that the discriminating practice is the act of hiring. The District Court, however, found that" the specific harm complained of is not the decision to hire or not to hire based on the results of these pre 1973 examinations" (Opin. p. 12). In Point I B, the appellees maintain that the discriminatory practice is the lay-offs. The District Court apparently approved this proposition while nonetheless observing that it resulted from a non-discriminatory seniority system (Opin. p. 12). Unhappy with all these theories, appellees now characterize their argument and the District Court's finding as one of continuing discrimination. There is no support for that latter day conclusion either in the District Court's opinion or in the cases cited by plaintiff. The examinations challenged here were certified at a specific point in time which predated Title VII and all rights to appointment from them were definitively determined then.

Appellees inexplicable failure to exhaustively challenge the examinations at that earlier time does not convert a discrete employment determination into a continuing violation. Under state law plaintiffs were required to assert their rights within four months of the promulgation of eligible lists.

tiffs were required to assert their rights within four months of the promulgation of eligible lists. Matter of Lennox v. McNamara, 16 Misc 2d 9 (Sup. Ct., N.Y. Co.), aff'd 275 App. Div. 1023 (2nd Dept., 1948). Moreover when plaintiffs did challenge the examinations under 42 USC §1983 (Guardians I), they abandoned their claims and accepted appointments based upon these examinations.

At that point all 4000 persons appointed from the lists had a right to rely upon their relative date-of-hire seniority rights.

(IV)

The plaintiffs are in error when they urge that it is within the discretion of a District Court to order, in effect, the firing of non-minority officers in favor of minority officers without a full hearing on relief. The discretion of the District Court in framing relief derives from factual findings adduced at a hearing on the propriety of relief. Equal Employment Opportunity Commission v. Local 14 International Union of Operating Engineers, No. 76-6150 (2d Cir., March 21, 1977).

Here, the "hearing" was merely an effort to force appellants to accede to plaintiffs demand for seniority adjustments notwithstanding appellants assertion that proof of qualifications for hire at the constructive seniority date, current eligibility status,

examination score and appointment date, should all be part of the hearing on relief. The District Court, however, would not hear such evidence. It was concerned only with implimenting plaintiffs prayer for relief and not in hearing relevant testimony on relief as required by the law in this Circuit.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED, WITH COSTS.

April 22, 1977.

Respectfully submitted,

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AFFIDAVIT OF SERVICE ON ATTORNEY OF PRINTED PAPERS

City, County and State of New York, ss.:

Jeffrey Rentsen

being duly sworn, says, that on the 22 day of APR. , 1977

at No. 1 CHASE MANH PLAZA in the Borough of MANH. in The City of New York, he served three copies of the annexed REPLY BRIEF upon DAVIS, POLK + WARDELL Esq., the attorney for the PLTFF - APPELEES in the within entitled action by delivering three copies of the same to a person in charge of said attorney's office during the absence of said attorney therefrom, and leaving the same with him.

Sworn to before me, this 22
day of APR. , 19 77

Jeffrey Rentsen

BRUCE S. GARNER
Commissioner of Deeds
City of New York - No. 4 1788
Commission Expires May 1, 1978

Bruce Garner